

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio

Spl. Criminal A.T. Appeal No. 84 of 2020

Appellants: Abdul Saboor son of Abdul Rauf through Mr. Moulana Muhammad Wajiullah Khan along with Mr. Arshad Hussain Lodhi, advocates.

Respondent: The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General.

Complainant: Through Mr. Waqar Alam Abbasi, advocate.

Spl. Criminal A.T. Appeal No. 85 of 2020

Appellants: Muhammad Imran son of Abdul Rauf through Mr. Moulana Muhammad Wajiullah Khan along with Mr. Arshad Hussain Lodhi, advocates.

Respondent: The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General.

Complainant: Through Mr. Waqar Alam Abbasi, advocate.

Date of hearing: 22.03.2022

Date of announcement: 30.03.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J- Through captioned criminal anti-terrorism appeals, the appellants Abdul Saboor and Muhammad Imran have challenged the judgment dated 26.03.2020 (*impugned judgment*), passed by the Anti-Terrorism Court-XIII at Karachi in Special Case No. 1778 of 2017 culminated from FIR No. 149/2017 registered with Police Station Jamshed Quarter u/s 397, 302 and 34

PPC read with S. 7 of the Anti-Terrorism Act (ATA) 1997. Through the impugned judgment, the appellants have been convicted for the offence punishable u/s 302 PPC and sentenced to suffer life imprisonment with a fine of Rs.200,000/- each to be paid to the LRs of the deceased in default whereof to suffer further imprisonment for one year and u/s 397 PPC to suffer rigorous imprisonment for 10 years with a fine of Rs.100,000/- each, in default whereof to undergo further imprisonment for three months more.

2. Precisely, facts of the prosecution case are that on 11.05.2017, the complainant Muzafar was present in his house at Fajr time when his brother-in-law Imran Hussain came to his house in an injured condition and disclosed that two young dacoits had broken into his house and shot at his house inmates. Upon disclosure of such information, the complainant accompanied his brother-in-law to the house where he found four house inmates including his sister Mst. Rukhsana, his sister's son Yasir and his sister's two daughters Aliya and Warisha lying in the same room in injured condition. He shifted the injured to Jinnah hospital where during treatment, Yasir succumbed to his injuries. The complainant got his statement u/s 154 Cr.P.C recorded which was incorporated in the FIR and as such FIR was lodged.

3. After usual investigation, the accused were arrested, challaned and presented before the trial Court where a formal charge was framed against them to which they pleaded not guilty and claimed to be tried. At trial, prosecution examined as many as seventeen witnesses who all supported the prosecution case and presented various documents, duly exhibited. Thereafter, prosecution side was closed. Statements of the accused u/s 342 Cr.P.C were recorded wherein they pleaded their innocence, claimed to have been falsely implicated and examined DW-1 Aneela and

DW-2 Naeema Begum. However, the accused did not examine themselves on oath as required u/s 340(2) Cr.P.C.

4. Learned trial Court, after hearing the relevant parties and perusing the material available on the record, convicted and sentenced the appellants as stated supra.

5. Learned counsel for the appellants have contended that the appellants are innocent and have been falsely involved in the present case due to DW-1 Aneela who was related to one DSP Tanoli getting married with the appellant Abdul Saboor and as such the appellants were falsely implicated on his behest; that the judgment passed by trial court is perverse and shocking and against the criminal administration of justice; that the trial Judge while awarding the conviction has not considered the contradictions made in the evidence of the PWs; that no independent witness have been cited by the prosecution and all the PWs are related to the deceased; that the appellants were shown to the PWs during their custody at the police station; that no accurate description of the assailants was given in the FIR or the 161 Cr.P.C statements of the witnesses, as such the identification parade is not reliable. In support of his contentions, he has relied on the case law reported as *Shah Faisal v. The State* (2021 YLR 244), *Nadeem Khan and 2 others v. The State* (2020 YLR 2461), *Wali Muhammad v. The State* (2020 MLD 980) and *Kanwar Anwaar Ali* (PLD 2019 SC 488).

6. Learned APG on the other hand, assisted by the learned counsel for the complainant, controverted the suggestions of false implication of the appellants while contending that the mobile phones robbed during the incident were recovered from them at the time of their arrest; that four PWs have placed both the appellants on the scene of the offence and two of them have correctly identified the

appellants while assigning them specific roles, as such he prays for the dismissal of the instant appeals.

7. We have heard the learned counsel for the parties and perused the record available before us. From the perusal of record, it is revealed that the incident took place on 11.05.2017 early morning when the complainant, present in his house, was approached by his brother-in-law Imran who was injured. Imran disclosed to the complainant that two young dacoits had broken into their home at 4:40 am, robbed three mobile phones with SIM cards, one without a SIM and had also injured his house inmates after getting them all in one room. Hearing this, the complainant accompanied Imran to his house where he found his sister Mst. Rukhsana who had received a gunshot wound to her abdomen, his sister's son Yasir who had received a gunshot wound to his head, his sister's daughter Aliya who had sustained a gunshot wound to her waist and his sister's other daughter Warisha who had received a bullet injury on her leg while Imran himself had a gunshot wound on his thigh. He shifted the injured to Jinnah Hospital where police recorded the statement of the complainant u/s 154 Cr.P.C which was then incorporated in the FIR. During treatment, complainant's nephew Yasir succumbed to his injuries and died. The complainant was examined as PW-1 by the prosecution who narrated the same facts as were disclosed by him in his statement u/s 154 Cr.P.C and found full support by the injured-PWs/victims of the dacoity. All these material witnesses went through lengthy cross-examinations which also bore no fruitful result for the defence. PW-12 Dr. Ali Raza was also examined by the prosecution to ascertain the locale of injuries on the deceased who deposed that he found two injuries on the head of the deceased Yasir; one on the right temporal region which was the entry wound and the other on the left side which was the exit wound. He also found blackening around the wound which suggests that the shot

was fired from a close proximity with intention to kill by the dacoits. This fact was also confirmed by the victims of the crime. PW-2 Imran Hussain deposed in his examination-in-chief that *"All of a sudden door of my room opened and I found two persons with my son Athar Hussain alias Yasir and saw the two persons having weapons in their hands. The accused who was armed with weapon directed my son and me to lay down on the earth... He made a fire upon my son on his head and then fire upon my wife..."* PW-3 Mst. Rukhsana, wife of Imran Hussain, deposed that *"All of a sudden we heard the voice of the door and got up and saw that two persons tall and one clean shave having pistols in their hands entered into the rooms... the accused disclosed that he will kill my son, on which they fired upon my son on head"* PW-3 Aliya, their daughter, deposed that *Then accused asked that he will kill my brother and my mother requested them to spare my brother meanwhile accused made fire on head of my brother."* PW-4 Warisha, their other daughter, also deposed in a similar manner while stating that *"Meanwhile accused brought my brother in the said room and directed us to hand over all valuables to him, my mother requested him to spare my brother, but the accused asked that he will kill him, and fired at my brother"* When these depositions are put in juxtaposition with the medical evidence, ocular account furnished by the prosecution finds full support. The FIR itself, promptly lodged, is also specific as to how the incident took place, albeit the same is hearsay by the complainant and is based on the disclosure of such facts by PW-2, however the complainant himself witnessed the immediate aftermath of the situation. The contents of the FIR find more than enough corroboration through the depositions of all the prosecution witnesses. As far as the delay in recording 161 Cr.P.C statements of the witnesses is concerned, the prosecution sufficiently explained the same while relying on the FIR registered which explained that such delay was caused due to the prime witnesses being unconscious and

under treatment at the hospital. Prosecution case is further strengthened by the recovery of the mobile phones that were robbed from the PWs.

8. As far as establishing identity of the assailants is concerned, it is a matter of record that the appellants were unknown to the complainant party and the FIR was lodged against two unknown dacoits. Down the line, the appellants were arrested and presented before the Judicial Magistrate for conducting their identification parade. The general principle regarding conducting identification parades has been laid down in the recent case of *Mian Sohail Ahmed v. The State (2019 SCMR 956)*, wherein the Hon'ble Apex Court has emphasized that care and caution must be taken by the Courts in ensuring that an unknown accused is correctly identified. For an identification parade to be properly held, it is essential that the accused are not shown to the victims prior to the identification itself. To ensure this, PW-14 SIP Zulfiqar deposed that he had delivered clothes to both the accused so that they could hide themselves when the victims had visited the police station to get their statements recorded. Again, in his cross-examination, he confirmed the said fact while deposing that the accused were kept with their faces muffled in the police lockup and he was not controverted on this aspect any further. This, in itself, is sufficient for us to believe that the appellants were not shown to the victims prior to the identification parade. Therefore, the stance taken by the appellants in their statement of accused holds little, if any, weight. Furthermore, the incident took place inside the house of PW-2 Imran Hussain. One would reasonably assume the availability of light inside the house, otherwise prosecution witnesses would not have been able to give the description of the assailants being young, tall and one being clean shaven. We have also gone through the evidence of PW-16 Judicial Magistrate Zuhaib Ahmed who

conducted the identification parade of the appellants. The identification parade admittedly started at 0930 hours on 30.08.2017 which is when the custody of the appellants was kept with Court Staff and the police officials were directed to leave the premises. Appellant Abdul Saboor was stood amongst eight dummies and Imran Hussain (PW-2) was brought in who identified him while stating that he had shot at his son Yasir on his head and shot at five persons in total. Imran was then sent to the chambers of the Judicial Magistrate and the other witness PW-3 Mst. Rukhsana was brought in who also identified the appellant Abdul Saboor correctly while stating that he shot at all of them and then shot at her son in his head. She was also sent away to the Judicial Magistrate's chambers. Then, appellant Muhammad Imran was brought in and stood amongst eight new dummies. PW-2 Imran Hussain was brought in to identify him who correctly did so and stated that he had looked in the room, fired two shots and then ran away. Imran Hussain was sent away and PW-3 Mst. Rukhsana was brought in who also identified the appellant Muhammad Imran while stating that he was initially stood outside, then he came in and fired shots while taking the mobile phones. The identification parade was conducted while following all the guidelines as laid down in the case of *Kanwar Anwaar Ali (PLD 2019 SC 488)* and we find no legal defects in the identification parade. Learned counsel for the appellants also contended that the prosecution witnesses had failed to provide an accurate description of the assailants in their statements or before the Court. At this juncture, guidance is sought from the case of *Muhammad Hayat and another v. The State (2021 SCMR 92)* wherein the Hon'ble Apex Court has been pleased to observe that:-

“On factual plane, learned counsel has not been able to point out even obliquely any collusion, conspiracy or consideration impelling the witnesses to hurriedly swap innocent proxies to the dismay of devastated families, enduring abiding trauma. Reference to omission of assailants' features in the crime report

as a ground to discard the test identification parade is equally inconsequential; Part C of the Lahore High Court Rules and Orders Volume-III (adopted by the High Court of Balochistan) does not stipulate any such condition. In the natural course of events, in an extreme crisis situation, encountered all of a sudden, even by a prudent onlooker with average nerves, it would be rather unrealistic to expect meticulously comprehensive recollection of minute details of the episode or photographic description of awe-inspiring events or the assailants. The pleaded requirement is callously artificial and, thus, broad identification of the assailants, in the absence of any apparent malice or motive to substitute them with the actual offenders, is sufficient to qualify the requirement of Article 22 of the Order *ibid.*”

(emphasis supplied)

9. Learned counsel for the appellant, at some length, also contended that the FSL report was found to be negative for the weapons recovered from the appellants at the time of their arrest. Not only is it a settled principle of law that forensic evidence is merely confirmatory evidence, but also in the presence of direct evidence, the same would not be of any help to the defence case. The weapons recovered from the appellants were not the same ones used by them in the commission of the offence for which a separate case u/s 23(i)(a) Sindh Arms Act was registered against them. Even if the FSL report is taken out of consideration, the evidence of PW-2 Imran Hussain and PW-3 Mst. Rukhsana is consistent, straight forward, confidence inspiring and trustworthy and their presence at the time of incident has been explained, therefore their evidence alone is sufficient to hold the appellants guilty of the charge. The Hon’ble Apex Court has upheld conviction in the case of *Niaz-ud-Din and another v. The State* (2011 SCMR 725) on the basis of solitary statement of the complainant alone. The case of the prosecution is firmly structured on ocular account, furnished by the witnesses, viewed from any angle, natural and trust-worthy. Moreover, the deceased was murdered in the presence of his mother, father and two sisters. It is unusual for them to set free the real culprit and nominate

innocent persons instead and that too without any justifiable reason or rhyme as held in the case of *Islam Sharif v. The State* (2020 SCMR 690).

10. So far the defence plea of false implication and the examination of two defence witnesses is concerned, both of them are related to the appellants, DW-2 Naeema even being their mother. Their statements and the plea taken by the appellants of false implication due to appellant Saboor's court marriage with DW-1 Aneela barely hold substance and appear to be belated arrangements made by the appellants of well-wishers to testify in their favour, but the same fail to override positive evidence pointing towards their culpability. In this respect, reliance is placed on the case of *Ibrarullah v. The State* (2021 SCMR 128). Moreover, DSP Tanoli also has no concern with the complainant party nor has the defence been able establish any relation or connection between them. Therefore, prosecution has successfully discharged its burden in proving the culpability of the appellants Abdul Saboor and Muhammad Imran and nothing was brought on record by the appellants to controvert the presumption that they were in fact the assailants who had attacked upon an unsuspecting family and taken an innocent life. Learned trial Court has already taken a very lenient view while awarding lesser punishment of imprisonment for life to the appellants, more particularly to the appellant Abdul Saboor who ruthlessly shot the deceased Yasir point black in his head.

11. For what has been discussed above, we find that the prosecution has proven the guilt of the appellants beyond reasonable doubt. As such, the convictions and sentences awarded to the appellants are maintained and the impugned judgment passed by the learned trial Court is upheld. Resultantly, captioned Special Anti-

Terrorism Appeal Nos. 84 and 85 of 2020 are dismissed being meritless.

JUDGE JUDGE